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70-241

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

NO. 1785

TEXACO, INC.

Petitioner,

v.

AUGUSTINE GIZZI and ANTHONY GIACCIO,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No.

Texaco, Inc.

Petitioner,

v.

Augustine Gizzi and Anthony Giaccio,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above entitled case on January 20, 1971.

OPINIONS BELOW.

The majority and dissenting opinions of the United States Court of Appeals for The Third Circuit (Appendices A and B respectively, pp. 1a and 6a) are reported in 437 F.2d 308 and 311.

JURISDICTION.

The judgment of the Court of Appeals was entered on January 20, 1971. A timely petition for rehearing was denied on March 8, 1971. The jurisdiction of the District Court was based on diversity of citizenship and amount under 25 U.S.C. § 1352(a)(1). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED.

1. Whether a supplier which may be unable to protect itself from liability because control over its independent dealers is regulated by federal antitrust law, should be held liable under state tort or warranty law for the actions of such independent dealers?

2. Whether this Court should exercise its supervisory powers to control the standards followed by a Court of Appeals in reversing the findings of a district court on an important question of state law where the decision of the Court of Appeals conflicts with applicable state court decisions?

STATEMENT.

These are two diversity actions to recover damages for personal injuries sustained in an automobile accident. Admittedly, this Court rarely exercises its discretion to review such cases. However, the issues raised by this Petition have significant and far-reaching impact on the public interest.

This case presents a very real conflict between the federal congressional policy of maintaining the independence of gasoline service station dealers and a state rule of law, as interpreted by the Court of Appeals, which may have the effect of requiring the oil industry to exercise greater control over the activities of their service station dealers—independent businessmen who serve the needs of the motoring public throughout the nation. In addition, this Court is called upon to exercise its supervisory powers to control the standards of review in the federal courts, because the Court of Appeals, in a decision in conflict with state court rulings, has reversed the findings of the district court on an important question of state law.

Respondent, Augustine Gizzi, purchased a used truck van from Russell Hinman, an independent contractor who

operated a service station under lease from Petitioner, Texaco, Inc. (R. 41a). The station operator, Hinman, agreed *as an incident of the sale* to put the van in good working order (R. 22a Appendix A, p. 3a). The work was completed within two weeks, Gizzi paid the $400 purchase price and, accompanied by Respondent Giaccio, drove off in the van to make a delivery (R. 22a, 27a, 28a, 30a, 31a). The brakes failed, the van collided with a tractor trailer, and both plaintiffs sustained the injuries for which they now claim Petitioner to be liable (R. 31a, 34a).

Petitioner, Texaco, Inc., was the only defendant named in the complaint. The case was tried in the United States District Court for the Eastern District of Pennsylvania. At the close of plaintiffs' case, Petitioner moved for a directed verdict under Rule 50(a) of the Federal Rules of Civil Procedure. On April 24, 1970, the trial judge granted the motion and a directed verdict was entered in favor of petitioner. Respondents appealed the order to the Third Circuit Court of Appeals which reversed the judgment by divided vote on January 20, 1971. The majority opinion by Judges McLaughlin and Aldisert is printed as Appendix "A". A dissenting opinion written by Judge Seitz appears as Appendix "B".

The theory of liability advanced by Respondents was that Texaco had clothed its dealer, Hinman, with apparent authority to make the necessary repairs and sell the vehicle on Texaco's behalf and that Gizzo reasonably assumed as a result of its advertising that Texaco would be responsible for any defects in the repairs performed by Hinman. (Appendix A, p. 3a.)

In granting Texaco's motion for a directed verdict, the District Court held as a matter of law that no juror could reasonably interpret the Texaco advertising, signs or slogans as creating any apparent authority in connection with the sale of the used van:

> "I am convinced that as a matter of law there could not be any apparent authority on the basis of

what I heard so far or what I have had the slightest glimmer that you could show, no apparent authority on the part of this operator to bind Texaco in connection with the sale of this used Volkswagon bus . . .

"In short, nobody could reasonably interpret any of these slogans or representations or indicia of control as dealing with anything more than the servicing of automobiles, and to the extent of putting gas in them and the ordinary things that are done at service stations.

"That 'Trust your car to the man who wears the star' could not possibly be construed to apply to installing new brake systems or selling used cars." (Appendix A, pp. 4a, 5a.)

The Court of Appeals reversed; substituting its judgment for that of the District Court on the question of whether reasonable men could differ regarding the issue of apparent authority.

The majority opinion of the Court of Appeals concedes that Hinman sold the van on his own behalf, and not on behalf of Texaco:

"With regard to the sale of this vehicle, no actual agency existed between Texaco and Hinman. Although most of the negotiations involved in the transaction took place at the Texaco station, *the record indicates that Hinman was selling the van on his own behalf, and not on behalf of Texaco.* Texaco received no portion of the proceeds. The corporation was not designated the seller on the bill of sale, title to the vehicle being listed in the name of a company located in Atlantic City, New Jersey. Gizzi did receive a Texaco credit invoice as a receipt for the cash he paid. It would seem that this was an available convenience utilized by Hinman to record the transaction." (Appendix A, pp. 2a, 3a.) (Emphasis added.)

The Court of Appeals also noted that in support of their theory of liability Respondents introduced evidence to show that "*Texaco exercised control over the activities of the service station in question.*" Significantly, the only such evidence to which the court referred (other than Texaco's advertising), was as follows: (1) that approximately 30 percent of the Texaco dealers in the country engage in the sale of used cars and that such activity is known to and acquiesced in by the corporation; (2) that Texaco had a regional office located directly opposite the service station in question and Texaco personnel working in that office were aware of the fact that used vehicles were being sold from the station; and (3) that there were signs displayed indicating that an "expert foreign car mechanic" was on the premises. (Appendix A, p. 4a.)

A timely petition for rehearing was denied by the Court of Appeals on March 8, 1971.

REASONS FOR GRANTING THE WRIT.

I.

The references in the Court of Appeals' Opinion to the evidence showing that "Texaco exercised control over the activities of the service station in question" (Appendix A, p. 4a) demonstrate that a principal's right to control his agent constitutes the legal basis for imposing liability on a principal for the agent's tortious conduct.

However, the evidence noted by the court to support the existence of control does not, in fact, support that conclusion. That thirty percent of Texaco's independent dealers sell used cars does not demonstrate control by Texaco, but to the contrary, demonstrates the lack of actual control. That Texaco may have acquiesced in the knowledge that used cars were sold from Hinman's station and that repair signs were displayed, again demonstrates that Texaco did not exercise control over its dealer's activities, since no effort was made to require the dealer to cease selling used cars or remove the signs (R. 166a, 169a). But, even aside from the unfairness of a finding that facts which actually negate the existence of control, support that conclusion, if such factors are to be considered in determining a supplier's tort liability, those suppliers may have to begin to exercise such control.

For example, in order adequately to protect themselves from liability in situations such as that at bar, suppliers may not only have to revamp their national advertising, but refuse to permit dealers to sell used cars, make automobile repairs, or render many of the countless other services offered by service station dealers throughout the country, unless such activities are stringently controlled by the supplier. For if Texaco and other companies must become the guarantors of the non-negligent performance of such services, then they must exercise control over the conduct of their dealers in performing

them. However, should Texaco or any other company attempt to exercise control over such matters as whether or not its independent dealers may sell used cars or perform repair work, they would run an even greater risk of violating a clearly established federal policy of maintaining the independence of the retail service station dealer.

The policy of the federal government over many years has been to protect the service station dealer from control by his oil company supplier. Soon after World War II, the Department of Justice and the Federal Trade Commission instituted a program to insure the independence of the gasoline retailer. The program appears from the decisions of this Court in *Standard Oil Company of California* v. *United States,* 337 U.S. 293, (1948); *United States* v. *Richfield Oil Corp.,* 99 F.Supp. 280 (S.D. Calif. 1951), *aff'd. per curiam,* 343 U.S. 922 (1952); and continues to the present as forcefully demonstrated by the decisions of this Court in *FTC* v. *Texaco, Inc.,* 393 U.S. 223 (1968); *Atlantic Refining Co.* v. *FTC,* 381 U.S. 357 (1965).

The policy of the federal government, as represented by the Department of Justice, the Federal Trade Commission and the federal courts, clearly protects the independence of the gasoline retailer. In the language of the Federal Trade Commission:

> "The importance of the small retailer in our economy is difficult to overstate. In the gasoline industry, he is the competitive entity that bears the great proportionate investment. As a small businessman, an individual entrepreneur, his welfare is of particular concern to this commission. Interference with his right to compete as he chooses and unlawful practices that blunt the effect of his efforts and tend to cause his elimination are matters calling for public intervention." (Federal Trade Commission Report on Anti-competitive practices in the Marketing of Gasoline [1967]).

Any deviation by Texaco from its present policy in an effort to exercise that control necessary to protect against state tort liability may be contrary to declared federal policy. This Court will resolve such federal-state conflicts when satisfied that enforcement of state law would stand as an obstacle to the accomplishment and execution of the full purposes and objectives of the Federal Government. *Farmers Educational & Coop. Union* v. *WDAY, Inc.*, 360 U.S. 525 (1959). In *Farmers*, state libel laws were held inapplicable to a broadcaster unable to protect himself from liability thereunder because required by federal statute to broadcast political speeches without editing. Here, Texaco and other similarly situated companies should not be forced to protect themselves against liability by exerting control over their dealers' activities, because federal antitrust policy may prohibit the exercise of such control.

II.

This Court should exercise its supervisory powers to review the action of the Court of Appeals in overruling the district court on an important question of state law regarding the quantum of evidence required to submit the issue of apparent agency to the jury. The decision of this question may affect not only Texaco but all companies conducting national advertising campaigns and doing business in New Jersey. Indeed, review is appropriate under this Court's Rule 19(1)(b), because the Court of Appeals decided the state law question in apparent conflict with state court decisions.

It is not disputed that in reviewing the district court's grant of a directed verdict, New Jersey law should apply. Under New Jersey law, whether an agency or apparent agency relationship existed is a question of fact to be submitted to the jury *unless* on the evidence presented only one reasonable conclusion could be reached. In the latter case the issue should not be submitted to the jury. *Harvey* v. *Craw*, 110 N.J. Super. 68, 264 A.2d 448 (1970).

The evidence presented by plaintiff admitted of only one reasonable conclusion. Both the circuit court and the trial court found that the repairs made to the truck van purchased by plaintiff were "incidental" to the sale (R. 196a, 197a, Appendix A, p. 3a). In other words, plaintiff intended to buy a car, not service, from Texaco's dealer. Plaintiff presented no evidence that Texaco ever represented that its service stations are also used car agencies or that its independent dealers were authorized to sell used cars or that Texaco guaranteed used cars sold by its dealers. That Texaco acquiesced in thirty percent of its dealers selling used cars cannot in fairness be construed to create an apparent authority, since neither plaintiff had such knowledge at the time of sale. This evidence merely suggests that retail dealers are free to sell used cars if they wish and that Texaco and other oil companies do not find such activity to be in conflict with the successful retail distribution of their own products. In fact, suppliers would risk antitrust prosecution if they dictated the products or services their dealers may or may not offer.

In *Wallach* v. *Williams*, 52 N.J. 504, 246 A.2d 713 (1968), the New Jersey Supreme Court expressly reserved decision on the issue whether an oil company which gives the impression that it owns and operates a service station as a result of signs and advertising can be held liable for the negligence of an independent contractor who operates the station. The court held that the proofs presented by plaintiff in that case fell "short of establishing a factual issue for determination by the jury as to the liability of defendant [oil company]." (246 A.2d at 714).

In the instant case the Court of Appeals considered the precise issue presented in *Wallach*. In *Wallach* the evidence on the issue of apparent authority was, if anything, more appropriate for submission to the jury. There, plaintiff was injured incident to having his car fueled on the service station property—an agency related activity.

Here, Respondents' injuries arose as the result of the purchase of a used car—a personal activity of the dealer, unrelated to the business of his supplier.

Moreover, by deciding that a question for the jury was presented, the Court of Appeals placed itself in conflict with New Jersey law in yet another way. By expressly reserving its decision in *Wallach* the New Jersey Supreme Court left undisturbed *Brittain* v. *Atlantic Refining Co.*, 126 N.J.L. 528, 19 A.2d 793 (E. & A. 1941) and its progeny which held that an oil company is not liable for the negligent acts of its lessees, because there is no actual company control over the operation of independent service stations.

The trial judge found as a matter of New Jersey law that plaintiff had failed to produce sufficient evidence from which a reasonable inference could be drawn in plaintiff's favor. In federal diversity cases the opinion of the trial judge as to matters of local law is entitled to great weight. *Wessel* v. *Prudential Insurance Company of America*, 361 F.2d 571 (8th Cir. 1966); *Illinois Central Railroad Company* v. *Stufflebean*, 270 F.2d 801 (8th Cir. 1959); *Cities Service Oil Company* v. *Adair*, 273 F.2d 673 (10th Cir. 1959). The decision of the trial judge, based upon first hand knowledge of the applicable state law and intimate involvement with the trial, should be affirmed unless clearly erroneous. See *Dick* v. *New York Life Insurance Co.* 359 U.S. 437, 447 (1959).

CONCLUSION.

For the foregoing reasons, this Court is respectfully requested to grant the petition for certiorari to the Court of Appeals for the Third Circuit.

ALFRED W. CORTESE, JR.
RICHARD J. VAN RODEN
Attorneys for Petitioner,
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PEPPER, HAMILTON & SCHEETZ
Of Counsel

APPENDIX A

CORRECTED COPY

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 18,976, 18,977

AUGUSTINE GIZZI and ANTHONY GIACCIO,
Appellants

v.

TEXACO, INC., *Appellee*

(D.C. Civil Action No. 41278)

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued October 27, 1970

Before McLAUGHLIN, SEITZ and ALDISERT,
Circuit Judges

OPINION OF THE COURT

(Filed January 20, 1971)

McLAUGHLIN, *Circuit Judge.*

The question posed on this appeal is whether the trial judge properly granted appellee Texaco's motion for a directed verdict in this personal injury action. Jurisdiction in the district court was based on diversity of citizenship and requisite amount in controversy.

Appellant Augustine Gizzi was a steady patron of a Texaco service station located on Route 130 and Chestnut Street, Westville, New Jersey. The real estate upon which

the station was situated was owned by a third party and was leased to the operator of the station, Russell Hinman. Texaco owned certain pieces of equipment and also supplied the operator with the normal insignia to indicate that Texaco products were being sold there.

In June of 1965, the station operator, Hinman, interested Gizzi in a 1958 Volkswagen van, which Hinman offered to put in good working order and sell for $400. Gizzi agreed to make the purchase and Hinman commenced his work on the vehicle. The work took about two weeks and included the installation of a new master braking cylinder and a complete examination and testing of the entire braking system. On June 18, 1965 Gizzi came to the station and paid the $400. He was given a receipt for the payment and was told that the car would be ready that evening. Gizzi returned at about six o'clock, accompanied by appellant Anthony Giaccio. They took the van and then departed for Philadelphia, Pennsylvania, to pick up and deliver some air-conditioning equipment. While driving on the Schuylkill Expressway, Gizzi attempted to stop the vehicle by applying the brakes. He discovered that the brakes did not work and, as a result, the vehicle collided with the rear end of a tractor trailer causing serious injuries to both Gizzi and Giaccio.

Texaco, Inc. was the only defendant named in the complaint and at trial, the testimony was all directed to the corporation's liability, the court having asked for an offer of proof on that question.

With regard to the sale of this vehicle, no actual agency existed between Texaco and Hinman. Although most of the negotiations involved in the transaction took place at the Texaco station, the record indicates that Hinman was selling the van on his own behalf, and not on behalf of Texaco. Texaco received no portion of the proceeds. The corporation was not designated the seller on the bill of sale, title to the vehicle being listed in the name of a

company located in Atlantic City, New Jersey. Gizzi did receive a Texaco credit invoice as a receipt for the cash he paid. It would seem that this was an available convenience utilized by Hinman to record the transaction.

The repair work performed by Hinman was incidental to the sale of the vehicle. He offered to put the vehicle into good working order to further induce Gizzi to purchase it. Some work was done on the van after the money had been paid on June 18 and all work on the braking system was completed prior to that date.

The theory of liability advanced by appellants below was that Texaco had clothed Hinman with apparent authority to make the necessary repairs and sell the vehicle on its behalf and that Gizzi reasonably assumed that Texaco would be responsible for any defects, especially defects in those portions of the van which were repaired or replaced by Hinman. It was further contended that Gizzi entered into the transaction relying on this apparent authority, thereby creating a situation in which Texaco was estopped from denying that an agency did in fact exist.

The concepts of apparent authority, and agency by estopped are closely related. Both depend on manifestations by the alleged principal to a third person, and reasonable belief by the third person that the alleged agent is authorized to bind the principal. The manifestations of the principal may be made directly to the third person, or may be made to the community, by signs or advertising. Restatement (Second), Agency §§ 8, 8R, 27 (1957). In order for the third person to recover against the principal, he must have relied on the indicia of authority originated by the principal, *Bowman* v. *Home Life Ins. Co. of America,* 260 F.2d 521 (3 Cir. 1958); Restatement (Second) Agency § 267 and such reliance must have been reasonable under the circumstances. *N. Rothenberg & Son, Inc.* v. *Nako,* 49 N.J. Super. 372, 139 A.2d 783 (App. Div.

1958); *Hoddeson* v. *Koos Bros.*, 47 N.J. Super. 224, 135 A.2d 702 (App. Div. 1957); *Mattia* v. *Northern Ins. Co. of New York*, 35 N.J. Super. 503, 114 A.2d 582 (App. Div. 1955); *Elger* v. *Lindsay*, 71 N.J. Super. 82, 176 A.2d 309 (County Court 1961).

In support of their theory of liability, appellants introduced evidence to show that Texaco exercised control over the activities of the service station in question. They showed that Texaco insignia and the slogan "Trust your car to the man who wears the star" were prominently displayed. It was further established that Texaco engaged in substantial national advertising, the purpose of which was to convey the impression that Texaco dealers are skilled in automotive servicing, as well as to promote Texaco products, and that this advertising was not limited to certain services or products. The record reveals, that approximately 30 per cent of the Texaco dealers in the country engage in the selling of used cars and that this activity is known to and acquiesced in by the corporation. Actually Texaco had a regional office located directly opposite the service station in question and Texaco personnel working in this office were aware of the fact that used vehicles were being sold from the station. It was further established that there were signs displayed indicating that an "Expert foreign car mechanic" was on the premises.

Appellant Gizzi testified that he was aware of the advertising engaged in by Texaco and that it had instilled in him a certain sense of confidence in the corporation and its products.

In granting Texaco's motion for a directed verdict the court stated:

> "I am convinced that as a matter of law there could not be any apparent authority on the basis of what I heard so far or what I have had the slightest glimmer that you could show, no apparent authority

on the part of this operator to bind Texaco in connection with the sale of this used Volkswagon bus . . .

"In short, nobody could reasonably interpret any of these slogans or representations or indicia of control as dealing with anything more than the servicing of automobiles, and to the extent of putting gas in them and the ordinary things that are done at service stations.

"That 'Trust your car to the man who wears the star' could not possibly be construed to apply to installing new brake systems or selling used cars."

We are of the opinion that the court below erred in granting the motion. Questions of apparent authority are questions of fact and are therefore for the jury to determine. *Lind* v. *Schenley Industries, Inc.*, 278 F.2d 79 (3 Cir. 1960); *System Investment Corp.* v. *Montview Acceptance Corp.*, 355 F.2d 463 (10 Cir. 1966); *Frank Sullivan Co.* v. *Midwest Sheet Metal Works*, 335 F.2d 33 (8 Cir. 1964). On a motion for a directed verdict, and on appeal from the granting of such a motion, all evidence and testimony must be viewed in a light most favorable to the party against whom such motion is made and that party is entitled to all reasonable inferences that could be drawn from the evidence. *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962); *Denneny* v. *Siegel*, 407 F.2d 433 (3 Cir. 1969). While the evidence on behalf of appellants by no means amounted to an overwhelming case of liability, we are of the opinion that reasonable men could differ regarding it and that the issue should have been determined by the jury, after proper instructions from the court.

For the reasons stated herein, the order of the district court will be vacated and the case remanded for further proceedings consistent with this opinion. We do not pass on the merits of any other claims advanced on this appeal, but leave them for the consideration of the district court on the remand.

APPENDIX B

SEITZ, *Circuit Judge,* dissenting.

I would affirm the order of the district court.

The two plaintiffs in this case each seek to recover damages for their personal injuries, claiming that Texaco is liable under the following four theories: (1) breach of warranty with respect to the sale of the delivery van; (2) breach of warranty with respect to the repairs which were made on the van before the sale; (3) vicarious liability for Hinman's negligence in repairing the van; and (4) negligence in permitting an unqualified person such as Hinman to perform repairs at its service station. Although this diversity action was brought in the Eastern District of Pennsylvania, where the accident occurred, it is not disputed that the issue of Texaco's liability is governed by the substantive law of New Jersey.

Plaintiffs first claim that Hinman warranted that the van was in good running condition and had no mechanical defects; at trial, they presented evidence which indicated that Hinman expressly told them that the van was "in A-1 shape" and that the brakes in particular were in good working order. I agree with the majority that no actual agency relationship existed between Texaco and Hinman with respect to the sale of used vehicles, but I disagree that the district court erred in granting Texaco a directed verdict on the issues of apparent agency and agency by estoppel. The following statement of New Jersey law is pertinent to the disposition of this case:

> "One who represents that another is his agent and thereby causes a third person justifiably to rely upon the care or skill of such apparent agent is subject to liability to the third person for harm caused by the lack of care or skill of the one appearing to be servant as if he were such. Restatement, Agency, par 267.

> . . . This rule normally applies where the plaintiff has submitted himself to the care or protection of an apparent servant in response to an apparent invitation from the defendant to enter into such relations with such servant. A manifestation of authority constitutes an invitation to deal with such servant and to enter into relations with him *which are consistent with the apparent authority.*"

Elger v. *Lindsay,* 71 N.J. Super. 82, 176 A.2d 309, 312 (Law Div. 1961) (emphasis added); *see N. Rothenberg & Son, Inc.* v. *Nako,* 49 N.J. Super. 372, 139 A.2d 783 (App. Div. 1958); *Price* v. *Old Label Liquor Co.,* 23 N.J. Super. 165, 92 A.2d 806 (App. Div. 1952). Assuming that a person of ordinary prudence would be entitled to believe that Hinman was Texaco's agent in the sale of gasoline, oil, tires, and other items which are ordinarily sold at a filling station, it does not follow that a reasonable man would believe that Hinman's apparent authority extended to the sale of used cars. Such a belief would, in my view, be unreasonable. Moreover, in the absence of an appearance of agency, Texaco's mere acquiescence in the sale cannot be said to create an agency by estoppel. Where the evidence permits only one reasonable conclusion on the issue of agency, that issue must be decided by the trial court, not the jury, *Harvey* v. *Craw,* 110 N.J. Super. 68, 264 A.2d 448 (App. Div. 1970).

I believe that a directed verdict was equally proper on plaintiffs' second and third theories of liability, involving the repairs which Hinman performed on the van. In *Wallach* v. *Williams,* 52 N.J. 504, 246 A.2d 713 (1968), the Supreme Court of New Jersey expressly reserved decision on whether an oil company which creates the impression by signs and advertising that it operates a service station can be held liable for the negligence of an independent contractor who operates the station. The facts of the present case also make it unnecessary to decide this

issue. As both the majority and the district court have indicated, the repair work was purely incidental to the sale of the vehicle. Gizzi quoted Hinman as offering not only to sell the van for $400 but also to replace the master cylinder and muffler, repair the engine, repaint the vehicle, and generally "put it in A-1 shape" at no extra charge. I agree with the district judge that, considering plaintiffs' evidence in its most favorable light, the sale was strictly a personal transaction and Hinman made the repairs in his individual capacity simply to induce the sale. Particularly since the cost of the repairs was absorbed into the overall sales price, which was payable directly to Hinman, in my view, no reasonable man could conclude that Hinman was acting as a servant or agent of Texaco.

Finally, I believe that a directed verdict was proper on plaintiffs' claim that Texaco negligently permitted Hinman to perform automobile repairs even though he was unqualified and incompetent to do such work. Plaintiffs' only evidence was that Texaco itself did not give Hinman any specialized training. They produced no evidence to show either Hinman's incompetence of Texaco's negligence.

A True Copy:

Teste:

THOMAS F. QUINN
Clerk of the United States Court of Appeals for the Third Circuit.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 18,976 and 18,977

AUGUSTINE GIZZI & ANTHONY GIACCIO

vs.

TEXACO, INC.

AUGUSTINE GIZZI,
Appellant in No. 18,976

ANTHONY GIACCIO,
Appellant in No. 18,977

(D.C. Civil Action No. 41278)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: McLAUGHLIN, SEITZ and ALDISERT, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed April 24, 1970, be, and the same is hereby vacated, and the cause remanded for further proceedings in accordance with the opinion of this Court.

Attest:
THOMAS F. QUINN,
Clerk

January 20, 1971

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Judge Fullam, Presiding Date: April 24, 1970

Cause No. 41278

Title of Cause: Augustine Gizzi and Anthony Giaccio vs. Texaco, Inc.

Directed Verdict entered by the Court.

Judgment is and the same is herewith entered in favor of the defendant Texaco, Inc. and against the plaintiffs Augustine Gizzi and Anthony Giaccio.

Attest:

By JOSEPH RODGERS
Deputy Clerk

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Supreme Court, U.S.
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JUN 24 1971
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70-241

October Term, 1970 No. 1785

TEXACO, INC.,

Petitioner,

vs.

AUGUSTINE GIZZI and ANTHONY GIACCIO,

Respondents.

REPLY CONTRA PETITION FOR A WRIT OF CERTIORARI

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Supreme Court of the United States

October Term, 1970

No. 1785

TEXACO, INC.,

Petitioner,

vs.

AUGUSTINE GIZZI and ANTHONY GIACCIO,

Respondents.

REPLY CONTRA PETITION FOR A WRIT OF CERTIORARI

Question Presented

The existence of an apparent agency, an agency by estoppel and/or agency is a question of fact to be determined by the tryers of the facts, to wit, the Jury.

Statement of the Case

These are two diversity actions to recover damages for personal injuries sustained in an automobile accident within one hour after the vehicle in question was both serviced and sold by a Texaco service station due to the failure of the operator of said Texaco service station to properly repair and/or install the braking system.

Reasons for Denying the Writ

The questions presented by petitioner, Texaco, Inc., were never presented or argued or raised in the Circuit Court of Appeals. Furthermore, this is an action for personal injuries arising out of breach of warranties and negligence against petitioner, Texaco, Inc., which, through its own conduct of mass media advertising and uniformity of its Texaco service stations, caused members of the general public to believe that they were dealing with the national company, Texaco, Inc., and rely on its supposed good name and reputation. THERE NEVER WAS ANY QUESTION OR ISSUE OF FEDERAL ANTI-TRUST LAW OR CONFLICT OF THE APPLICABLE STATE LAW AS APPLIED BY THE FEDERAL COURT. The questions as presented by petitioner, Texaco, Inc., were so worded and drawn so as to interest the United States Supreme Court in accepting this case for review and are in no way connected with the real issue of this case; to wit, agency, apparent agency, agency by estoppel, negligence and breach of warranty, all of which questions are proper jury questions to be determined by a jury.

The petitioner, Texaco, Inc., quite candidly admits that this Court rarely exercises its discretion to review cases involving personal injuries based on diversity of citizenship actions. But, petitioner claims to have raised significant and far-reaching issues which are of great public interest. It is submitted that the questions presented were manufactured for the sole purpose of interesting this Court to take jurisdiction and review a simple warranty and negligence case based on agency principles.

Conclusion

It is submitted that this Court deny the Petition for Certiorari and assess costs against the Petitioners.

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